

Direction under Section 106(3) of the Communications Act 2003 applying the electronic communications code in the case of Bytel Networks Limited

A Notification of this proposal was published on 3 August 2006

Whereas:

- (A) On 21 July 2006, Bytel Networks Limited (registered company number NI50325) made an application for the electronic communications code (the "Code") for the purposes of the provision of an electronic communications network in the United Kingdom in accordance with section 107(1) of the Communications Act 2003 (the 'Act') and the notification published by the Director General of Telecommunications under section 107(2) of the Act on 10 October 2003 setting out the requirements with respect to the content of an application for the electronic communications code and the manner in which such an application should be made;
- (B) By virtue of the Transitional Provisions, references to the Director in the Notification referred to paragraph A above should be read as references to Ofcom;
- (C) On 3 August 2006, Ofcom published a notification of their proposal to give a direction applying the Code to Bytel Networks Limited in accordance with section 107 of the Act;
- (D) Ofcom have considered every representation made to them about the proposed Direction;
- (E) For the reasons set out in the explanatory statement accompanying this Direction, Ofcom are satisfied that they have acted in accordance with their relevant duties set out in sections 3, 4 and 107(4) of the Act

NOW, therefore, pursuant to section 106(3) of the Act, Ofcom make the following Direction-

1. The electronic communications code shall apply to Bytel Networks Limited for the purposes of the provision by Bytel Networks Limited of an electronic communications network to have effect in the United Kingdom.

Definitions and Interpretation

2. "Director General of Telecommunications" means the Director General of Telecommunications appointed under section 1 of the Telecommunications Act 1984; and
3. "Transitional Provisions" means sections 408 and 411 of the Act, the Communications Act 2003 (Commencement No.1) Order 2003 and the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No 2) Order 2003.
4. In this Direction, except in so far as the context otherwise requires, words and phrases shall have the same meaning as in the Act, headings and titles shall be disregarded and expressions cognate with those referred to in this Direction shall be construed accordingly.

5. The Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
4. This Direction shall take effect on the day it is published.

Steve Unger
Director Of Technology, Competition Group

**A person authorised by Ofcom under paragraph 18 of the Schedule to
the Office of Communications Act 2002**

14 September 2006

Explanatory Statement

1.1 On 21 July 2006, Bytel Networks Limited (“Bytel”) applied to Ofcom for a direction applying the electronic communications code (the “Code”). This application was made in accordance with section 107(1) of the Communications Act 2003 (the “Act”) and meets the requirements for any such application for a Direction applying the Code, and the manner in which such an application has to be made, as set out in the Notification published by the Director General of Telecommunications on 10 October 2003 under section 107(2) of the Act. Ofcom assumed its functions in relation to the Code on 29 December 2003, and by virtue of transitional provisions in the Act, references to the Director General of Telecommunications in the Notification referred to in this paragraph should be read as references to Ofcom.

1.2 On 3 August 2006, Ofcom published a notification of its proposal to give a direction applying the Code to Bytel in accordance with section 107 of the Act. Representations on the proposal were invited by 4 September 2006. Ofcom received one representation in relation to its proposal and it was supportive of it.

1.3 In considering Bytel’s application, Ofcom has acted in accordance with its relevant duties set out in sections 3 and 4 of the Act. In particular, Ofcom has considered its duty in section 3(1)(b) “to further the interests of consumers in relevant markets, where appropriate by promoting competition” and the first Community requirement set out in section 4(3)(a) to promote competition “in relation to the provision of electronic communications networks and services”. In this case, amongst other things, Bytel intends to construct a large scale communications network which will provide broadband capabilities to areas beyond the extent and reach of some other communications providers operating in the broadband access market in Northern Ireland.

1.4 Bytel explained that it was established specifically with the objective of creating a carrier neutral and open access network throughout Northern Ireland. It already has an agreement in place with another communications provider so that it can use its system of conduits and it now wishes to install additional wholly-owned conduits. Optical fibre will be installed throughout its system of conduits (both those leased and those wholly-owned) and the company will also provide dark fibre for use by other communications providers and users. The optical fibre will be used to provide various data services (see below).

1.5 Ofcom has considered the application with regard to its duties set out in section 107(4) of the Act. Its views on the matters set out therein in relation to the application are set out below.

The benefit to the public of the electronic communications network by reference to which the Code is to be applied to the applicant

1.6 Bytel already offers various data-based services (e.g. point-to-point Ethernet private circuits) via the conduit space that it has leased from another communications provider. However, the company wishes to expand the network at its disposal and therefore pass more premises and increase its potential customer-base which is presently limited to the extent of the other provider’s network. The company aims to extend its network to provide variable speed broadband services to both business and residential customers including to some that are beyond the reach of other

communications providers operating in the broadband access market in Northern Ireland.

1.7 Ofcom considers, therefore, that the network will benefit the public and increase competition in the provision of communications services.

The practicability of the provision of the network without the Code

1.8 As explained in paragraph 1.6, Bytel already provides various data-based services and it clearly has not needed Code powers to provide these services. However, Bytel intends to install its own wholly-owned conduits in order to expand the network at its disposal. The current space that it leases does not extend to the last mile and does not, therefore, allow Bytel to offer services to end-users beyond the extent of the other communications provider's network.

1.9 Bytel considers that Code powers would enable it to extend its reach more rapidly because, in the absence of Code powers, it would be necessary for it to obtain a street works licence each time it wished to break up or open a street and this process is likely to delay build. Code powers, however, allow providers to carry out street works for the purposes of installing and maintaining their networks without needing a specific street works licence to do so.

1.10 Bytel believes that, in the absence of Code powers, it would be placed at a competitive disadvantage because other communications providers operating in the broadband access market in Northern Ireland already benefit from Code powers.

1.11 Ofcom accepts that Bytel would be significantly disadvantaged should it not benefit from Code powers whereas other communications provider do. For these reasons, Ofcom considers that it should grant Code powers to Bytel.

The need to encourage the sharing of the use of electronic communications apparatus

1.12 Bytel explained that it already has a track record of sharing infrastructure in that it hosts another communications provider's equipment in one of its points-of-presence. In addition, Bytel's application included a letter from another communications provider which showed that there has clearly been dialogue between the parties with a view to sharing infrastructure.

1.13 Bytel's application also explained that it plans to pass dark fibre through its system of conduits for use by other communications providers and service providers.

Whether the Applicant will be able to meet liabilities as a consequence of:

(i) the application of the Code; and

(ii) any conduct in relation to the application of the Code

1.14 Bytel's application included a breakdown of the types of equipment that it will install and an explanation as to whether the equipment would be placed on public highways – and therefore require it to put in place funds to meet any potential liabilities – or private land. It then set out the methodology that it has chosen to use in

order to provide for sufficient funds to meet any potential liabilities. The company also informed Ofcom of the name of the financial institution that will provide for the funds.

1.15 For these reasons, Ofcom is satisfied that Bytel will secure funds to meet any potential liabilities.

1.16 In terms of responsible use of the Code, Bytel explained that it has already contacted the Department of Regional Development in Northern Ireland – the department that co-ordinates street works – to indicate that it would wish to join the Northern Ireland Road Authority and Utilities Committee (essentially a group that considers, amongst other things, the co-ordination of street works).